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No. 88-1404

In the Supreme Court of the United States

OCTOBER TERM, 1988

MONSANTO COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a court, having found that generators of hazardous materials are jointly and severally liable under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9607, for costs of cleaning up the site where such materials were deposited, may defer the generators' contribution claims to a separate proceeding.

2. Whether, if government agencies also sent hazardous substances to the site, the defendants bear the burden under CERCLA of establishing that joint and several liability is inappropriate because the harm at the site is divisible.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B30) is reported at 858 F.2d 160. The opinion of the district court (Pet. App. E1-E19) is reported at 653 F. Supp. 984.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 1988. A petition for rehearing was denied on December 2, 1988 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on February 24, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This is an action brought by the United States and the State of South Carolina under the Comprehensive En-

vironmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, to recover from petitioners and others costs incurred by the federal and state governments in cleaning up the surface of an abandoned hazardous waste site near Columbia, South Carolina. Under CERCLA Section 104, 42 U.S.C. 9604 (1982 & Supp. IV 1986), the United States may expend funds from the Hazardous Substances Superfund (Superfund) to abate an actual or threatened release of a hazardous substance and, pursuant to CERCLA Section 107, 42 U.S.C. 9607 (1982 & Supp. IV 1986), bring suit against certain "covered persons" to recover those costs.

1. This litigation concerns the "Bluff Road" hazardous waste site, which was operated by South Carolina Recycling and Disposal, Inc. (SCRDI), and a predecessor company from 1973 to 1980. Each of the petitioner companies contracted with SCRDI for the treatment or disposal of hazardous wastes during this period. As a result of haphazard disposal and storage procedures followed at the site, "an environmental hazard of staggering proportions developed." Pet. App. E4; see *id.* at B5-B6.

In 1980, the United States Environmental Protection Agency (EPA) investigated the site and concluded that it posed a major threat to the environment. Later that year, pursuant to Section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. 6973, the United States filed suit for injunctive relief against an owner of the site and two lessees who had operated the waste disposal business there. The State of South Carolina intervened as a plaintiff. During discovery, the United States identified a number of waste generators, including petitioners, several federal agencies, and one state agency, that had arranged for disposal of hazardous substances at the site. An agreement was reached with 12 generators and one transporter

of waste to perform 75% of the surface cleanup of the site.[1] Pet. App. B7, E4.

2. Following completion of the initial surface cleanup, the United States filed an amended complaint in 1982 against five non-settling generators, including petitioners, two landowners, and two companies that had leased the property in order to operate the waste disposal business. The amended complaint added counts for injunctive relief and cost recovery under CERCLA. The State completed the remaining 25% of the surface cleanup using federal Superfund monies and state matching funds. Pet. App. B7-B8, E4.

The district court granted the governments' motion for summary judgment against petitioners. The court concluded that petitioners were liable parties under CERCLA Section 107(a)(3) because (1) "each * * * made arrangements with [the site operator] for disposal or treatment of wastes containing hazardous substances and * * * such wastes were shipped to the site"; (2) "hazardous substances like those of each * * * were present at the site at the time of cleanup" (3) "there were releases and threatened releases of hazardous substances at the site"; and (4) "the government incurred costs in responding to those releases and threatened releases." Pet. App. E8-E9.

The court also ruled that petitioners were jointly and severally liable (Pet. App. E10-E13). The court found that

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[1] We have been informed by the federal government's trial counsel that the government agencies that sent wastes to the site also have contributed the following amounts to the Superfund:

AGENCY	PAYMENT
EPA —	$51,975.00
Air Force	15,675.00
Army	5,500.00
Center for Disease Control	11,275.00
South Carolina Dep't of Health and Env'tl Control	6,000.00

"[b]ecause of the deleterious condition of the site at the time of the cleanup, it is impossible to divide the harm in any meaningful way" (*id.* at E11). The court rejected petitioners' claim that the harm was divisible because it was subject to rough apportionment based on the responsible parties' relative volumetric contributions. "Such arbitrary or theoretical means of *cost* apportionment," the court reasoned, "do not diminish the indivisibility of the underlying harm, and are matters more appropriately considered in an action for contribution between responsible parties after plaintiff has been made whole" (*id.* at E12). The court consequently ordered petitioners to pay the United States and South Carolina the costs of their removal actions at Bluff Road, or $1,561,134 and $252,489, respectively (Pet. App. G2).

3. The court of appeals affirmed (Pet. App. B1-B30). The court of appeals agreed with the district court that petitioners were liable parties under CERCLA (Pet. App. B15-B17). The court concluded that petitioners had failed "to produce specific evidence creating a genuine issue that all of their waste was removed from the site prior to the release of hazardous substances there" (*id.* at B18). The court of appeals also concluded that petitioners had failed to carry their burden of establishing that there was a reasonable basis for apportioning the harm (*id.* at B20-B21). The court explained, moreover, that petitioners were free to pursue contribution claims against the other responsible parties, including governmental entities, and that the district court had not abused its discretion by not retaining the action to dispose of contribution questions (*id.* at B22).

Judge Widener dissented (Pet. App. B28-B30). He concluded that the district court was required to retain the claims pertaining to allocation of cleanup costs (*ibid.*).

Judge Widener concurred in the majority opinion in all other respects (*id.* at B28).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

1. There is no merit to petitioner's contention (Pet. 13-24) that the district court erred by not resolving their counterclaims for contribution against the government and other allegedly responsible parties. The district court acted properly. Petitioners had essentially abandoned those claims in the proceedings before that court, but, in any event, the court's action was consistent with Congress's desire to ensure EPA's rapid recovery of costs for reinvestment at other CERCLA sites.

a. Although petitioners' answers to the complaints filed by the state and federal governments included a claim against those governments in their capacity as waste generators, petitioners never pursued those claims in that court. Nor, with one exception,[2] did petitioners ever pursue claims against any other allegedly responsible party. During the two and one-half years between the district court's declaration that defendants were jointly and severally liable (Pet. App. E19) and the final order (Pet. App. G3), petitioners never contended that their liability should be reduced because of the participation of the government or others in arranging for the disposal of

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[2] Petitioner E.M. Industries asserted a third-party claim against G.D. Searle & Co. and Will Ross, Inc., which the district court rejected on its merits. See *United States* v. *South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 1010-1013 (D.S.C. 1984).

wastes at Bluff Road. The district court therefore can hardly be faulted for treating petitioners' claims as effectively abandoned.[3] And, for this reason, this case does not present a proper vehicle for considering the issue raised by the petition, which is whether the district court erred by postponing consideration of petitioners' counterclaim to a later separate action for contribution. See South Carolina Dep't Health & Env'tl Control Br. in Opp. 10-12.

b. In any event, the court of appeals' ruling that there would have been nothing wrong with such a postponement is correct and raises no issue warranting this Court's review. Congress intended for CERCLA Section 107 to provide an expeditious means for recovery of CERCLA funds expended in cleaning up hazardous waste sites. See H.R. Rep. No. 1016, 96th Cong., 2d Sess. 17 (1980). Timely cleanup of sites contaminated with hazardous substances requires expeditious disposition of claims brought under Section 107 to recover previously expended sums. For this reason, other courts, like the district court here (Pet. App. E13 & n.8), have regularly concluded that

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[3] Even though the court of appeals read the district court's order as deferring consideration of petitioners' counterclaims to a later action, that would not preclude a determination that the claims were abandoned. Indeed, we believe the district court treated the claims as abandoned. The district court's final order (Pet. App. G3) expressly ruled that the government's claims regarding subsurface and groundwater contamination would be heard in a subsequent action. Had the court intended similarly to defer the petitioners' contribution claims, the court presumably would have mentioned those claims in that same order. The language in the district court opinion (Pet. App. E12-E13 n.8) to which the court of appeals referred (see Pet. App. B22) was not addressing the viability of petitioners' contribution claims. The district court was there responding only to petitioners' generic claim that the harm at the site was divisible because there existed "means of roughly apportioning the costs of cleanup" (Pet. App. E12).

entry of judgment with respect to the threshold liability question should not be delayed pending resolution of the type of complex apportionment issues that frequently accompany CERCLA litigation. See, *e.g.*, *O'Neil* v. *Picillo*, 682 F. Supp. 706, 725-726 (D.R.I. 1988), appeal pending, No. 88-1551 (1st Cir.) ("[b]y delaying thorny considerations of equitable apportionment to a later contribution proceeding, the government is provided immediate funds after the initial liability hearing to take prompt remedial action at the earliest opportunity"); *United States* v. *Stringfellow*, 661 F. Supp. 1053, 1060-1061 (C.D. Cal. 1987).

In adopting the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613, Congress reaffirmed that apportionment issues should not interfere with EPA's ability to achieve rapid recovery of Superfund costs for reinvestment at other sites. SARA added an explicit authorization for contribution actions in Section 113(f), 42 U.S.C. 9613(f) (Supp. IV 1986).[4] The House Judiciary Committee explained that this amendment was intended "to ratify current judicial decisions that the courts may use their equitable powers to apportion the costs of clean-up among the various responsible parties involved with the site." H.R. Rep. No. 253, 99th Cong., 1st Sess. Pt. 3, at 18 (1985). The Committee cautioned, however, that "after all questions of liability and remedy have been resolved, courts may consider any criteria relevant to determining whether there should be an apportionment" (*id.* at 19).

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[4] Even prior to SARA's enactment, courts had held that contribution among responsible parties was an integral part of CERCLA's scheme of joint and several liability. See, *e.g.*, *Colorado* v. *ASARCO*, 22 Env't Rep. Cas. (BNA) 1926 (D. Colo. 1985); *Wehner* v. *Syntex Agribusiness, Inc.*, 616 F. Supp. 27, 31 (E.D. Mo. 1985).

Contrary to petitioners' submission (Pet. 13-15), the principle that apportionment issues should not be allowed to interfere with governmental enforcement applies with equal force where, as here, government agencies are allegedly liable parties. Section 113(f) affirms that liable parties may seek contribution against "any other person who is liable or potentially liable under section 9607(a) * * *." Section 101(21), 42 U.S.C. 9601(21) (1982 & Supp. IV 1986), includes the United States and the State in the definition of "person", and Section 120(a), 42 U.S.C. 9620(a) (Supp. IV 1986), specifically makes "[e]ach department, agency, and instrumentality of the United States" subject to CERCLA, "including liability under section 9607 of this title." In addition, Section 113(f), 42 U.S.C. 9613(f) (Supp. IV 1986), added to the statute by SARA, provides that a person may seek contribution from any other potentially liable person "*during or following* any civil action under * * * section 9607(a) of this Title" (emphasis added).

The legislative history confirms, moreover, that Congress intended federal and state[5] agencies to be treated like private entities for purposes of contribution actions. See H.R. Rep. No. 253 *supra*, Pt. 3, at 19, 20 (apportionment issues are to be resolved "after all questions of liability and remedy have been resolved" and "[t]he right of the United States to proceed under section 106 or 107 is unaffected by its status as an owner or operator of a facility or a generator of waste at the site"). That history also shows that Congress intended to give the courts discretion to defer contribution claims to a separate action. See 131

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[5] The Court is currently considering the question whether Congress intended CERCLA to abrogate the States' Eleventh Amendment immunity in *Pennsylvania* v. *Union Gas Co.*, cert. granted, 108 S. Ct. 1219 (1988).

Cong. Rec. 24,450 (1985) (remarks of co-sponsor Sen. Stafford) ("As a general rule, private party cleanup will occur more quickly if the courts first resolve issues of liability and remedies concerning the original defendants, leaving questions of apportionment until after the Government's action has been completed. Nonetheless, consistent with the Federal Rules of Civil Procedure, these decisions are left to the discretion of the court."); H.R. Rep. No. 253 *supra*, Pt. 1, at 80 (emphasis added) ("This provision [providing an explicit right of contribution] allows all counterclaims, cross-claims and third-party actions to be dealt with in a single action *if the court is so inclined.* District courts should carefully manage cases filed pursuant to this section to insure that the litigation is conducted in an expenditious [sic] manner and is not unduly delayed by the concurrent maintenance of third party actions.").[6]

Hence, the statutory language and legislative history refute petitioners' suggestion that Congress intended a different rule to apply in cases in which the government itself sent waste to the site that is the subject of the government's enforcement action. It is not surprising, therefore, that petitioners fail to refer to any specific evidence in either to buttress their claim that courts are required in those cases

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[6] For this reason, petitioners are not aided by Congress's decision to eliminate from an earlier version of SARA a prohibition on the bringing of any contribution action prior to entry of judgment in the government's enforcement action. See Pet. 16-17, citing S. 51, 99th Cong., 1st Sess. § 126 (1985). Congress eliminated that prohibition based on the belief that early filing of contribution claims might encourage settlements by bringing all liable parties to the bargaining table. See, *e.g.*, 131 Cong. Rec. 24,450 (1985) (remarks of Sen. Stafford). As described in the text above, however, congressional committees and sponsors simultaneously made clear that district courts would retain discretion to postpone consideration of contribution claims.

to consider such claims against the government as a defense to liability rather than as a claim in contribution.[7]

Contrary to the fears expressed by petitioners (Pet. 17-24), moreover, district courts can exercise this discretion in a manner that fulfills the statutory purposes and avoids unfairness. Where unfairness would otherwise result, a district court could simply bifurcate the government's case-in-chief and contribution claims, instead of deferring contribution issues to a subsequent action. In this case, however, there is no unfairness because, as the court of appeals explained (Pet. App. B22), petitioners "still have the right to sue responsible parties for contribution, and in that action they may assert both legal and equitable theories of cost allocation." Petitioners' contrary view, which is that postponement "substantially increased the likelihood that [petitioners] will never be able to obtain sufficient contribution" (Pet. 18), is based on a series of speculative contingencies. Indeed, petitioners acknowledge (Pet. 21), as they must, that the district court's two-

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[7] Petitioners' belated reliance (Pet. 15-16) on Fed. R. Civ. P. 54(b) is unavailing. That Rule does not purport to address the issue whether petitioners' claim against the United States must be treated as a defense to petitioners' liability rather than as a separate claim. It instead delineates the circumstances under which a district court may render final judgment as to one claim in a case raising multiple claims so that an immediate appeal may be taken from the court's ruling. See generally *Curtiss-Wright* v. *General Electric Co.*, 446 U.S. 1, 8-11 (1980). Moreover, even if petitioners are correct that the district court was required to make an express determination "that there is no just reason for delay," the remedy would have been dismissal of their appeal to the court of appeals for lack of jurisdiction, leaving the district court free on remand to make such a determination. In any event, because the district court was treating petitioners' counterclaims as abandoned (see note 3, *supra*), no such Rule 54(b) finding was necessary.

action procedure may "attain the same result" as the single action procedure they prefer.[8]

Finally, review is not warranted because there is no circuit conflict requiring this Court's attention. No other court of appeals has embraced petitioners' legal argument. Indeed, as petitioners concede (Pet. 24), "the Fourth Cir-

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[8] There is no merit to petitioners' suggestions (Pet. 21-23) that their liability in this case is "grossly disproportionate," "punitive," and "unlimited." As the court of appeals explained (Pet. App. B22 n.28), petitioners and the other defendants were found liable for slightly less than half of the total costs incurred in the surface cleanup, while petitioners produced approximately 22% of the waste that the site operator handled. As the court further explained (*ibid.*), a substantial part of that liability is attributable to litigation costs, which are recoverable under CERCLA. See *United States* v. *Mottolo*, 695 F. Supp. 615, 631 (D.N.H. 1988); *United States* v. *Northernaire Plating Co.*, 685 F. Supp. 1410, 1418 (W.D. Mich. 1988). Although petitioners were entitled to contest their liability, they cannot now complain that the resulting increase in the amount of the judgment is "punitive."

Nor is there any unfairness in the court of appeals' ruling (Pet. App. B22 n.29) that it would be premature to interpret the effect of settlements on petitioners' rights in a later contribution action, especially because petitioners did not press their contribution claims in the district court and, consequently, that court never discussed those claims. In any event, contrary to petitioners' contention (Pet. 19-21), this is not an appropriate case for resolving the effect of CERCLA settlements on the rights of non-settlers. Petitioners' claims (Pet. 20) of double recovery are unfounded. For instance, the order entering the consent decree between the plaintiffs and Columbia Organic Chemical Co., like the earlier settlements in this case, explicitly provided (Pet. App. F2) that the agreed settlement would reduce the total amount due the governments. Although similar express language was not included in the settlement with AquAir Corp., entered while this case was on appeal, that settlement will necessarily reduce the liability of petitioners pursuant to 42 U.S.C. 9613(f)(2) (Supp. IV 1986) (settlement "reduces the potential liability of the others by the amount of the settlement").

cuit is the first circuit court of appeals to speak to these issues." There is also no merit to petitioners' suggestion (*ibid.*) that there is a "serious impending split among the circuits." Indeed, in none of the district court opinions cited by petitioners did the court rule on the question, raised in this case, whether a district court may properly defer contribution claims where the government has brought a cost recovery action for the replenishment of the Superfund.[9]

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[9] For instance, *Mola Development Corp.* v. *United States*, No. CV 82-0819-RMT (C.D. Cal. May 5, 1986), was not a case brought by the United States to reimburse the Superfund, but a private action brought by owners of contaminated property who sued the United States because the Army allegedly owned the property when the contamination occurred. A private action such as *Mola*, involving a plaintiff who is a potentially responsible party as site owner, is akin to a contribution action from inception. In contrast to this case, there are no competing policy reasons in that setting for expediting the case-in-chief and insulating it from complicated contribution issues.

Nor is a future circuit conflict suggested by either *United States* v. *Mottolo*, 605 F. Supp. 898, 910-912 (D.N.H. 1985), or *United States* v. *Hardage*, 26 Env't Rep. Cas. (BNA) 1049, 1052 (W.D. Okla. 1987). The district courts in those two cases refused to dismiss some counterclaims against the governmental plaintiffs based on alleged governmental involvement at the waste site. Neither opinion considered the deferral issue presented here; nor did either suggest that a district court is without discretion to favor deferral.

Lyncott Corp. v. *Chemical Waste Management, Inc.*, 690 F. Supp. 1409, 1418 (E.D. Pa. 1988), *Edward Hines Lumber Co.* v. *Vulcan Materials Co.*, No. 85C1142, *reprinted in* 6 Haz. Waste Lit. Rep. (Andrews) 12,055, 12056 (N.D. Ill. 1987), aff'd on other grounds, 861 F.2d 155 (7th Cir. 1988), and *City of New York* v. *Exxon Corp.*, 697 F. Supp. 677 (S.D.N.Y. 1988), likewise do not aid petitioners' cause. Each concerned the effect of prior settlements on the liability of remaining parties and none of them addressed the deferral issue. Finally, petitioners' reliance on *United States* v. *Shell Oil Co.*, 605 F. Supp. 1064, 1082 (D. Colo. 1985), is also misplaced. The issue there was not deferral but whether a federal agency could be joined as a defendant in a CERCLA case brought by the United States.

2. Further review is also not warranted to consider petitioners' claims (Pet. 24-27) that where, as in this case, the government also sent hazardous substances to the hazardous waste site, the government must show that the harm at the site is indivisible in order to be entitled to joint and several liability under CERCLA. The court of appeals correctly held (Pet. App. B20-B21) that petitioners bore the burden of establishing that there was a reasonable basis for apportioning the harm at the Bluff Road site among responsible parties and that petitioners had failed to make that showing. No court has ever embraced petitioners' theory that a different rule should apply under CERCLA when the government is among those who sent waste to the site that is the subject of the enforcement action.

Contrary to petitioners' charge (Pet. 27), moreover, the court of appeals' rejection of petitioners' theory does not amount to "freewheeling judicial creation of federal substantive and procedural law." Congress specifically invited the courts to determine the applicability of joint and several liability under CERCLA based on "evolving principles of common law" (126 Cong. Rec. 30,932 (1980) (remarks of Sen. Randolph)). The lower courts have, as in this case, generally concluded that joint and several liability is warranted under CERCLA when the harm is single and indivisible and that, to avoid such liability, defendants bear the burden of showing that the harm is instead divisible and capable of apportionment. See, *e.g.*, *United States* v. *Chem-Dyne Corp.*, 572 F. Supp. 802, 810-811 (S.D. Ohio 1983); *United States* v. *Conservation Chemical Co.*, 589 F. Supp. 59, 63 (W.D. Mo. 1984); *United States* v. *Miami Drum Services, Inc.*, 25 Env't Rep. Cas. (BNA) 1469, 1474-1475 (S.D. Fla. 1986); *United States* v. *Medley*, 25 Env't Rep. Cas. (BNA) 1315, 1318-1319 (D. S.C. 1986);

United States v. *New Castle County,* 642 F. Supp. 1270, 1276-1277 (D. Del. 1986); *United States* v. *Stringfellow,* 661 F. Supp. 1053, 1060 (C.D. Cal. 1987); *United States* v. *Bliss,* 667 F. Supp. 1298, 1312-1313 (E.D. Mo. 1987). No court has held that the burden shifts to the government if the government also sent hazardous substances to the site in question.

In enacting SARA, Congress expressly endorsed this lower court precedent (see H.R. Rep. No. 253 *supra*, Pt. 3, at 19), and, in adding an explicit statutory cause of action in contribution,[10] made clear that "the burden of proof is on the defendant or party seeking apportionment to establish that it should be granted" (*ibid.*). In describing the rights of the government to proceed against parties who, as in this case, have not entered into a settlement, a committee report further emphasized that "[t]he right of the United States to proceed under section 106 or 107 is unaffected by its status as an owner or operator of a facility or a generator of waste at the site" (*id.* at 20). Hence, SARA's legislative history not only fails to support petitioners' thesis, it contradicts it.[11]

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[10] As amended by SARA, Section 113(f)(1), 42 U.S.C. 9613(f)(1) (Supp. IV 1986), directs the courts to "allocate response costs among liable parties using such equitable factors as the court determines are appropriate." SARA also added provisions to facilitate settlement and to reduce the potentially harsh effects of joint and several liability. For instance, Section 122(e)(2), 42 U.S.C. 9622(e)(2) (Supp. IV 1986), authorizes the government to suspend initiation of litigation or a response action for a short period of time in order to receive offers of settlement from potentially responsible parties. And, under Section 122(g), 42 U.S.C. 9622(g) (Supp. IV 1986), Congress addressed the problem of *de minimis* contributors by authorizing the government to offer them early, cash-out settlements of their potential liability.

[11] Petitioners' principal support for their contrary view is an isolated comment to Section 433B of the Restatement (Second) of

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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Torts (1965), which in paragraph (d) explains the burden shifting rule in terms of favoring the "proved tortfeasor" over the "entirely innocent plaintiff * * *." Contrary to petitioners' assumption, however, Congress's instruction to the courts to apply "evolving principles of common law" was not tantamount to requiring the courts to apply to CERCLA every statement and every explanation contained in the Restatement. Nor, for that matter, does the reference in comment (d) to "the proved tortfeasor" have any obvious bearing on CERCLA cases, in which the government is not required to make a traditional showing of either fault or causation (see Pet. App. B12, B16 n.17). In any event, there is no reason to treat the Superfund, for which recovery is sought, as any less "innocent" just because federal agencies contributed to the waste site. Finally, for similar reasons, petitioners' reliance on comment (e) to Restatement 433B is likewise misplaced. That comment suggests that shifting the burden of proof in a case with a large number of small contributors "may perhaps be unjust." Congress, however, has chosen to deal with the *de minimis* generator problem by directing the government to offer early, cash-out settlements (see note 10, *supra*), not by shifting the burden of proof.

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